Ram Kumar a/l Gopal Ram & Anor v Ram Kailash a/l Gopal Ram

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-22NCvC-82-02 OF 2016
YEOH WEE SIAM J
23 SEPTEMBER 2016

Evidence — Documentary evidence — Agreed bundle — Documents classified as Part B documents — Whether plaintiffs could dispute authenticity of documents — Whether documents admissible — Rules of Court 2012 O 34 r 2(2)

Trust and Trustees — Land — Whether trust created over land — Whether monies paid to defendant amounted to loan — Whether defendant proved payment — Whether elements to create trust proven

In August 2013, Samik Corp ('the developer') offered the plaintiffs a unit of apartment known as X2 Residency at HS(D) 07461 PT 15499, Mukim Dengkil, Daerah Sepang, Selangor. The plaintiffs were attracted to Petak A-16-07 with accessory Lot Nos L2-244, L3-115 and L3-136 ('the said property'). However, the plaintiffs did not qualify for the loan for 90% of the purchase price. The plaintiffs then made an oral agreement with the defendant that he would purchase the said property using his name and would then hold it on trust for the plaintiffs. The plaintiffs contended that: the defendant had no financial capacity to pay monthly instalments and the plaintiffs would pay for those instalments; the plaintiffs chose the said property and paid the RM5,000 booking fee; the plaintiffs took the effort to follow-up to ensure the Alliance Bank ('the bank') loan; and the only role of the defendant was to sign the sale and purchase agreement ('SPA') and the agreement for the bank loan. Whatsapp communication between the plaintiffs and defendant showed that the defendant bought the property with encouragement and assistance from the first plaintiff. The plaintiffs secured two loans from the bank for the defendant: a personal loan of RM39,490 (5% of purchase price of the said property and a housing loan of RM671,330 (85% of the purchase price of said property). The plaintiffs claimed that after receiving RM39,490 from the bank, the defendant transferred the sum to the second plaintiff, who in turn paid it to the developer. The plaintiffs allowed for the defendant to stay at said property for free, as a wedding gift. Around 15 March 2014, there was a misunderstanding over a family matter between the parties. The plaintiffs alleged the defendant claimed the apartment belonged to him and demanded RM150,000 should the plaintiffs want the said property to be transferred to them. The defendant alleged that he had borrowed the RM5,000 from the

plaintiffs to pay the booking fee, which was repaid by the defendant. The defendant further contended that the first plaintiff gave him a cheque with the sum of RM39,490 on Deepavali day, 2013. The defendant also claimed that he was paying all monthly installments for the bank loan, maintenance fees and outgoings for the said property from the time of purchase to date. The plaintiffs applied for the following orders: (a) a declaration that the defendant held the said property on trust for the plaintiff; (b) the defendant to transfer the said property to the plaintiff; (c) costs; and (d) any other relief deemed just by the court.

Held, dismissing the plaintiffs' claim with costs of RM8,000 subject to payment of allocator fee of 4% of the costs:

(1) The defendant had shown proof that he had paid the plaintiff the RM5,000 borrowed from the plaintiffs to pay the booking fee for the property. If it was true that the plaintiffs paid the booking fee to give rise to a trust, the defendant would not have paid back the sum to the second plaintiff. Further, during cross-examination, the first plaintiff agreed that the cash of RM5,000 was deposited into the second plaintiff's account after they had given the RM5,000 cheque to the defendant (see para 26).

(2) The first plaintiff had issued two cheques with the sum of RM39,490 each, the first was never cashed and the second cheque was cashed by the developer with a receipt issued in the defendant's name. The defendant had shown proof of paying the second plaintiff a sum of RM28,090. It was also noted that the second cheque was only issued after the defendant had paid the RM28,090. Therefore, it was not probable that the plaintiffs paid the RM39,490 to the developer to buy the property for themselves. It was more probable that the second cheque was given to the defendant as a loan. The court was satisfied that the defendant had rebutted the plaintiffs' allegation that the defendant holds the property on trust for the plaintiffs since the defendant had paid RM5,000 and RM29,490 to the developer. The defendant had paid back the plaintiff all monies owed (see paras 27–30 & 32).

(3) The Whatsapp communication were 'Part B' documents in the common bundle documents. Under O 34 r 2(2)(e)(i) of the Rules of Court 2012, Part B contains documents where the authenticity is not disputed but the contents are disputed. Thus, the contention that the Whatsapp communication had been doctored by a third party and therefore was not admissible in court was an afterthought and the court could not allow for the plaintiff to dispute its authenticity. The documents on the Whatsapp communication were admitted by this court as evidence since they are Part B documents. It was an afterthought for the plaintiffs to now dispute the authenticity of the Part B documents, and this could not be allowed (see paras 36–37).

(4) Based on the totality of evidence adduced by both parties, the plaintiffs failed to discharge their burden of proving the third element to create a trust, namely that there is certainty of words to the effect that the plaintiffs created a trust on the property which was held in the defendant's name. Further, there was no registration of the defendant holding the property 'as trustee' in the memorial of registration by the registrar under s 344 of the National Land Code. The plaintiffs failed to prove, beyond reasonable doubt, that they purchased the property in the defendant's name and such property was held on trust by the defendants for the plaintiffs (see paras 21 & 39–41).

[Bahasa Malaysia summary

Pada Ogos 2013, Samik Corp ('pemaju tersebut') telah menawarkan plaintif-plaintif sebuah unit apartmen dikenali sebagai X2 Residency di HS(D) 07461 PT 15499, Mukim Dengkil, Daerah Sepang, Selangor. Plaintif-plaintif berminat dengan Petak A-16-07 dengan aksesori Lot No L2-244, L3-115 dan L3-136 ('hartanah tersebut'). Walau bagaimanapun, plaintif-plaintif tidak layak mendapat pinjaman untuk 90% daripada harga belian. Plaintif-plaintif kemudian membuat perjanjian lisan dengan defendan bahawa dia akan membeli hartanah tersebut menggunakan namanya dan kemudian akan memegangnya atas amanah untuk plaintif-plaintif. Plaintif-plaintif berhujah bahawa: defendan tidak mempunyai kemampuan kewangan untuk membayar ansuran bulanan dan plaintif-plaintif akan membayar untuk ansuran tersebut; plaintif-plaintif memilih hartanah tersebut dan membayar RM5,000 untuk yuran tempahan; plaintif-plaintif mengambil usaha untuk membuat susulan bagi memastikan pinjaman Alliance Bank ('bank tersebut'); dan defendan hanya berperanan untuk menandatangani perjanjian jual beli ('PJB') dan perjanjian untuk pinjaman bank. Komunikasi Whatsapp antara plaintif-plaintif dan defendan menunjukkan bahawa defendan telah membeli hartanah tersebut dengan galakan dan bantuan daripada plaintif pertama. Plaintif-plaintif telah memperoleh dua pinjaman dari bank untuk defendan: pinjaman peribadi RM39,490 (5% daripada harga belian hartanah tersebut dan pinjaman perumahan RM671,330 (85% daripada harga belian hartanah tersebut). Plaintif-plaintif mendakwa bahawa selepas menerima RM39,490 dari bank, defendan telah memindahkan jumlah tersebut kepada plaintif kedua, yang kemudian membayarnya kepada pemaju. Plaintif-plaintif telah membenarkan defendan tinggal di atas hartanah tersebut dengan percuma, sebagai hadiah perkahwinan. Sekitar 15 Mac 2014, terdapat perselisihan faham tentang hal keluarga antara pihak-pihak. Plaintif-plaintif mengatakan bahawa defendan mendakwa apartmen tersebut dimiliki olehnya dan menuntut RM150,000 sekiranya plaintif-plaintif ingin hartanah tersebut dipindahkan kepada mereka. Defendan mengatakan bahawa dia telah meminjam RM5,000 daripada plaintif-plaintif untuk membayar yuran tempahan, yang telah dibayar balik oleh defendan. Defendan selanjutnya berhujah bahawa plaintif pertama telah memberinya cek berjumlah

RM39,490 pada hari Deepavali, tahun 2013. Defendan juga mendakwa bahawa dia telah membayar semua ansuran bulanan untuk pinjaman bank, yuran penyelenggaraan dan perbelanjaan untuk hartanah tersebut dari masa belian hingga kini. Plaintif-plaintif telah memohon untuk perintah-perintah berikut: (a) satu deklarasi agar defendan memegang hartanah tersebut atas amanah untuk plaintif; (b) defendan memindah hartanah tersebut kepada plaintif; (c) kos; dan (d) apa-apa relif lain yang difikirkan adil oleh mahkamah.

Diputuskan, menolak tuntutan plaintif-plaintif dengan kos RM8,000 tertakluk kepada bayaran yuran alokatur iaitu 4% daripada kos:

(1) Defendan telah menunjukkan bukti bahawa dia telah membayar plaintif RM5,000 yang dipinjam daripada plaintif-plaintif untuk membayar yuran tempahan untuk hartanah tersebut. Jika ia benar bahawa plaintif-plaintif telah membayar yuran tempahan untuk menimbulkan amanah, defendan tidak mungkin membayar balik jumlah itu kepada plaintif kedua. Selanjutnya, sepanjang pemeriksaan balas, plaintif pertama telah bersetuju bahawa wang tunai RM5,000 didepositkan ke dalam akaun plaintif kedua selepas mereka telah memberikan cek RM5,000 kepada defendan (lihat perenggan 26).

(2) Plaintif pertama telah mengeluarkan dua cek berjumlah RM39,490 setiap satu, yang pertama tidak pernah ditunaikan dan cek kedua telah ditunaikan oleh pemaju tersebut dengan resit yang dikeluarkan atas nama defendan. Defendan telah menunjukkan bukti membayar plaintif kedua sejumlah RM28,090. Ia juga diambil maklum bahawa cek kedua hanya dikeluarkan selepas defendan telah membayar RM28,090. Oleh itu, ia tidak mungkin bahawa plaintif-plaintif telah membayar RM39,490 kepada pemaju untuk membayar hartanah tersebut untuk diri mereka sendiri. Ia lebih berkemungkinan bahawa cek kedua itu telah diberikan kepada defendan sebagai pinjaman. Mahkamah berpuas hati bahawa defendan telah mematahkan dakwaan plaintif-plaintif bahawa defendan memegang hartanah tersebut atas amanah untuk plaintif-plaintif oleh kerana defendan telah membayar RM5,000 dan RM29,490 kepada pemaju. Defendan telah membayar balik plaintif semua wang yang terhutang (lihat perenggan 27–30 & 32).

(3) Komunikasi Whatsapp merupakan dokumen-dokumen 'Part B' dalam ikatan dokumen biasa. Di bawah A 34 k 2(2)(e)(i) Kaedah-Kaedah Mahkamah 2012, Part B mengandungi dokumen-dokumen di mana ketulenan tidak dipertikaikan tetapi kandungan yang dipertikaikan. Oleh itu, hujah bahawa komunikasi Whatsapp telah dipalsukan oleh pihak ketiga dan oleh itu tidak boleh diterima oleh mahkamah sebagai keterangan memandangkan ia adalah dokumen-dokumen Part B. Ia adalah suatu yang telah difikirkan kemudian untuk plaintif-plaintif sekarang mempertikaikan ketulenan dokumen-dokumen Part B, dan ini

tidak patut dibenarkan (lihat perenggan 36–37).

(4) Berdasarkan keseluruhan keterangan yang dikemukakan oleh kedua-dua pihak, plaintif-plaintif telah gagal untuk melepaskan beban mereka membuktikan elemen ketiga untuk membentuk amanah, iaitu terdapat kepastian kata-kata yang bermaksud bahawa plaintif-plaintif membentuk amanah ke atas hartanah tersebut yang dipegang atas nama defendan. Selanjutnya, tiada pendaftaran yang defendan memegang hartanah tersebut 'as trustee' dalam pendaftaran memorial oleh pendaftar di bawah s 344 Kanun Tanah Negara. Plaintif-plaintif telah gagal untuk membuktikan melampaui keraguan munasabah, bahawa mereka telah membeli hartanah tersebut atas nama defendan dan hartanah tersebut telah dipegang atas amanah oleh defendan-defendan untuk plaintif-plaintif (lihat perenggan 21 & 39–41).]

Notes

For cases on agreed bundle, see 7(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 1522–1536.

For cases on whether trust created over land, see 12(2) *Mallal's Digest* (5th Ed, 2015) paras 3175–3176.

Cases referred to

Emas Offshore (M) Sdn Bhd v Suhaimi bin Maryani and another action [2013] 10 MLJ 419; [2014] 10 CLJ 279, HC (refd)

Low Tin Yong @ Low Yong Lian v Low Yong Thuan [2016] 3 MLJ 332; [2016] 5 CLJ 217, CA (refd)

Legislation referred to

Rules of Court 2012 O 34 r 2(2)(e)(i)
National Land Code s 344

V Rajadevan (Rajadevan & Assoc) for the plaintiffs.
Sheelan Arjunan (Sheelan Arjunan & Co) for the respondent.

Yeoh Wee Siam J:

INTRODUCTION

[1] The first plaintiff is the husband of the second plaintiff. He is the elder brother of the defendant. The second plaintiff is therefore the sister-in-law of the defendant.

[2] The plaintiffs' claim is based on the cause of action of trust. The plaintiffs are claiming that the property that they had purportedly purchased

from the developer through the defendant, was held on trust for them by the defendant, and the plaintiffs require the defendant to transfer the property to them.

BRIEF FACTS

[3] The plaintiffs allege that around August 2013, Samik Corp ('the developer') contacted the plaintiffs and offered them a unit of apartment under a housing project known as X2 Residency at HS(D) 07461 PT 15499, Mukim Dengkil, Daerah Sepang, Selangor.

[4] The plaintiffs were attracted to one apartment at Petak A-16-07 with accessory Lot Nos L2-244, L3-115 and L3-136 ('property') with the purchase price of RM789,000 due to various reasons such as the low booking fee, 10% rebate from the purchase price, and that the remaining 90% sum of purchase price would be provided by the bank loan to be handled by the developer under the DIBS scheme.

[5] However, the plaintiffs were not qualified for a loan for 90% of the purchase price from the bank due to the fact that:

(a) the plaintiffs already have two housing loans with two different banks, and the plaintiffs are entitled only to a maximum of 70% of the purchase price for the housing loan for the property; and

(b) the first plaintiff had credit card issues.

[6] Under such circumstances, the plaintiffs made an oral agreement with the defendant by which the defendant would purchase the property using his name, and the defendant would hold it on trust for the plaintiffs.

[7] The plaintiff contend that the defendant has no financial capacity to pay the monthly instalments, and the plaintiffs would pay those instalments instead.

[8] The plaintiffs further contend that in line with the oral agreement:

(a) the plaintiffs chose the property;

(b) the plaintiffs paid the RM5,000 booking fee;

(c) the plaintiffs took the effort to manage and follow up all the relevant procedures and documents needed for the bank loan; and

(d) the only role of the defendant is to sign the sale and purchase agreement ('SPA') with the developer, and the agreement for the bank loan from Alliance Bank for the property.

[9] Subsequently, the plaintiffs secured two loans from Alliance Bank on behalf of defendant:

(a) a personal loan of RM39,490, which is 5% of the purchase price of the property; and

(b) a housing loan of RM671,330, which is 85% of the purchase price of the property (both loans to be referred to as 'the bank loan').

[10] The plaintiffs allege that after Alliance Bank had given the defendant the sum of RM39,490, the defendant then transferred the said sum to the second plaintiff. The second plaintiff in turn paid the sum to the developer.

[11] As a token of appreciation for helping them out, the plaintiffs allowed the defendant to stay at the property rent free, as a wedding gift to the defendant.

[12] At around 15 May 2014, there was a misunderstanding between the plaintiffs and the defendant over a family matter. The plaintiffs allege that the defendant now claims that the apartment belongs to him and the defendant demanded RM150,000 should the plaintiffs want him to transfer the property back to them.

[13] On the other hand, the defendant alleges that he purchased the property himself as he had intended to get married. He was inexperienced in buying property and therefore relied on the guidance and assistance from the plaintiffs.

[14] The defendant contends that he could not pay the booking fee of RM5,000 since the developer's sales office could not process payment by his credit card. The defendant alleges that he had borrowed the RM5,000 from the plaintiffs to pay the booking fee. Since then, he has paid the plaintiffs the loan of RM5,000.

[15] The defendant further contends that the first plaintiff gave him the sum of RM39,480 by way of a cheque on Deepavali day in 2013.

[16] It is the defendant's case that he is one who has been paying all the monthly instalments for the bank loan, management and/or the maintenance fees and all outgoings for the property from the time of purchase till to date.

THE PLAINTIFFS' CLAIM

[17] The plaintiffs are applying for the following orders as stated in para 15 of the statement of claim:

(a) a declaration that the defendant holds the property as a trustee for the plaintiffs;

(b) the defendant transfers the property to the plaintiffs;

(c) costs; and

(d) any other relief deemed just by this court.

ISSUES TO BE TRIED

[18] The issues to be tried are:

(a) whether the defendant purchased the property by way of the SPA dated 15 November 2013 in his name to be held on trust for the plaintiffs;

(b) whether the sum of RM44,490 which had been given by the plaintiffs to the defendant is a loan; and

(c) whether the defendant has paid the RM5,000 to the plaintiffs.

ANALYSIS AND FINDINGS

The law on trust

[19] In *Emas Offshore (M) Sdn Bhd v Suhaimi bin Maryani and another action* [2013] 10 MLJ 419; [2014] 10 CLJ 279 Zaleha Yusof J (as she then was) stated as follows:

> [35] In *ESPL (M) Sdn Bhd v Radio & General Engineering Sdn Bhd* [2005] 2 MLJ 422; [2004] 4 CLJ 674, the Court of Appeal held as follows:
>
> *It is settled that no particular form of words are necessary to create an express trust.*
>
> *Having established that there was an intention here to create a trust, it is now necessary to see if the other two requirements, namely, certainty of subject matter and of objects are present on the facts. Unless all three certainties are present there cannot be a trust. See, Knight v Knight* [1840] 49 ER 68.
>
> [36] *The EPSL's case show that a trust needs not be in writing. What needs to be established are three criteria ie, certainty of intention, certainty of subject matter and certainty of object.*
>
> [37] I agree with the plaintiff that the intention is a matter of evidence and it can be established by way of inference. The trust does not need to be in writing. Based on the uncontroverted testimony of PW1 the trust was an oral trust created between PW1 in his capacity as a director of the plaintiff and the DW1. In so far as certainty of subject matter, there is no issue as the subject matter is the Genesis shares. In relation to the certainty of object of the trust is concerned, there is no dispute that it was to enable the plaintiff to expand and widen its presence and operations in Malaysia.

[38] *Although the trust is not put into writing, as shown in EPSL's case I do not see any reason why the trust cannot be done orally*. As learned counsel for the plaintiff has correctly cited the case of *Wan Naimah v Wan Mohamad Nawawai* [1974] 1 MLJ 41; [1972] 1 LNS 164 in which Suffian CJ in the Federal Court held that:

> *The law is that a declaration of trust may be made quite informally, provided that the words used are clear and unequivocal*. As was stated by Romilly MR in *Grant v Grant*, words declaring *a trust 'need not be in writing ... They must be clear, unequivocal and irrevocable*, but it is not necessary to use any technical words, it is not necessary to say, 'I hold the property in trust for you', nor is it necessary to say, 'I hold the same for your separate use'. Any words that the donor means at the time he speaks, to divest himself of all beneficial interest in the property are, in my opinion, sufficient for the purpose of creating the trust. I think that it is also sufficient for the purpose of shewing that the trust has been created, if he afterwards states that he has so created the trust, though there was no witness except the done present at the time the trust was created. (Emphasis added.)

[20] In *Low Tin Yong @ Low Yong Lian v Low Yong Thuan* [2016] 3 MLJ 332 at p 346; [2016] 5 CLJ 217 at p 231 the Court of Appeal held that the standard of proof to be applied when determining whether or not a trust subsisted is one of proof beyond reasonable doubt, rather than one on a balance of probabilities.

FINDINGS

[21] In a nutshell, there is no legal requirement that the trust must be in writing. In the present case, it is an undisputed fact that there is no trust deed or any document to show that the defendant holds the property on trust for the plaintiffs. The plaintiffs contend that they rely on circumstantial evidence to prove that the trust exists. There is no document to create the trust because the first plaintiff trusted his brother, the defendant. In view of the cordial family relationship that existed then, the plaintiffs did not need a written document to show the trust.

[22] Based on the above authorities, in the absence of a trust in writing, the plaintiffs are required to prove the existence of the trust through:

(a) certainty of words;

(b) certainty of subject; and

(c) certainty of object.

[23] Regarding certainty of subject and certainty of object, it is clear that the subject and object refer to the property.

[24] Regarding certainty of words, the plaintiffs admit that there are no supporting documents to prove the trust. Thus, the plaintiffs rely on circumstantial evidence.

[25] From the evidence adduced by both parties, the court finds as follows.

[26] The plaintiffs contend that they paid the booking fee of RM5,000 to book the property with the developer. The defendant contends that he could not use his credit card at the sales office of the developer to pay the booking fee of RM5,000. Hence, he borrowed the RM5,000 from the plaintiffs. The defendant has shown proof that he has paid this booking fee to the plaintiffs (see slip from RHB Bank in CBOD Pt A p 204 which shows the sum of RM5,000 being paid into the second plaintiff's RHB account). If it is indeed true that the plaintiffs paid the RM5,000 to give rise to the trust, then the defendant would not have paid back the sum to the second plaintiff. The first plaintiff, under cross-examination, agreed that cash of RM5,000 was deposited into his wife's account after the plaintiffs had given the RM5,000 cheque to the defendant.

[27] The plaintiffs contend that the first plaintiff had issued the cheque dated 16 November 2013 ('first cheque') (CBOD Pt A p 262) for RM39,490 which was given to the defendant to pay the developer for the house. According to the defendant, this first cheque was given by the first plaintiff to the defendant as a wedding gift to him on the morning of Deepavali day at DW2's house. However, according to the first plaintiff, Deepavali day was on 2 November 2013, and not on 16 November 2013. The first plaintiff had never intended that the first cheque be given as a wedding gift to the defendant. Be that as it may, under cross-examination, the first plaintiff admits that the first cheque was never cashed.

[28] Subsequently, the first plaintiff issued another cheque dated 15 December 2013 for the same sum of RM39,490 ('second cheque') (CBOD Pt A p 257). This second cheque was cashed by the developer on 16 December 2013. However, the receipt issued by the developer dated 16 December 2013 is in the name of the defendant (CBOD Pt A p 263).

[29] The defendant has shown proof that he paid the second plaintiff the sum of RM28,090 on 10 December 2013 by transferring through Alliance Bank vide RENTAS the said sum into her account (CBOD Pt A p 260).

[30] It is noted that the second cheque was only issued by the first plaintiff on 15 December 2013 *after* the defendant had paid the second plaintiff the sum of RM28,090 on 10 December 2013. Therefore, it is not probable that the plaintiffs had paid the RM39,490 to the developer to buy the property for

themselves, and for the defendant to hold it on trust for them. It is more probable that the second cheque was given by the first plaintiff to the defendant as a loan.

[31] Under cross-examination, the first plaintiff admitted that the RM39,490 is the defendant's money which was banked into his wife's account over a few payments, and that part of this payment was prior to the release of the loan of RM39,490 from Alliance Bank. The first plaintiff also admitted that this RM39,490 was paid by the defendant into the second plaintiff's account because the plaintiffs have demanded from the defendant this money to be banked to them. The first plaintiff further admitted that in his Whatsapp communication texted to the defendant, he had said 'we borrow you RM39,490.00 when are you going to pay us back', and stated that that is their money.

[32] From the evidence adduced, the court is satisfied that the defendant has rebutted the plaintiffs' allegation that the defendant holds the property on trust for the plaintiffs since the defendant has shown that he himself had paid the RM5,000 and the RM39,490 to the developer. Whatever sums that the defendant owed to the plaintiffs, he has already paid them back.

[33] The plaintiffs submit that by the time the instalment payments were due, their relationship with the defendant had already turned sour. Nonetheless, the plaintiffs admit that it is the defendant who has been paying the monthly instalment payments for the bank loan taken from Alliance Bank to buy the property. The plaintiffs contend that the defendant could not afford to buy the house with his own salary. By the defendant's own admission, he even had to borrow money from his father to pay the MRTA. Be that as it may, the first plaintiff admits that the MRTA of RM17,286 was paid by the defendant to AIA Bhd, and that the management fees or charges for the property are paid by the defendant, and not by the plaintiffs. He agreed, under cross-examination, that if the property belongs to the plaintiffs with their purchase on trust by the defendant, then all outgoings in respect of the property must be borne by the plaintiffs. However, the plaintiffs did not pay for the outgoings. In short, the first plaintiff admitted that all payments have been made by the defendant, and the plaintiffs have not paid a single cent for the property (NOP pp 19–23).

[34] The first plaintiff agreed under cross-examination that under the DIBS scheme, the purchaser is still required to pay interest during the construction period until the delivery of vacant possession. The purchaser has to pay the interest to the bank first. Upon vacant possession being given, the developer would return to the purchaser all payments that have been made earlier by the

purchaser. The first plaintiff admitted that during the construction period, the defendant was the one who had paid interest to Alliance Bank, and not the plaintiffs.

[35] The Whatsapp communication between the plaintiffs and the defendant (CBOD Pt B pp 267–355) show that the defendant bought the property, ie his dream house, with encouragement and assistance from the first plaintiff, who is his elder brother, and the second plaintiff, who is his sister-in-law. The following Whatsapp communication throw light on the matter (note: 'Annai' refers to the first plaintiff; 'Jenny' or 'anni' refer to the second plaintiff'; and 'Rennick ram' refers to the defendant):

(a) '19/09/2013 11:02AM: Jenny: Mrng ... Once wake up call me ... Will update u of ur dream house X2 ... Hv good news for u ...';

(b) '19/09/2013 02:38 PM: Jenny: Annai sd if u really want to buy ur drem house, no need to take out all ur saving ... Just pay 5k & get ur loan approve for 90% & ready urself to move in happily ...';

(c) '23/09/2013 03:34PM: Jenny: But if u got any prob with loan/banker ask them to call me if u think u need any assistance otherwise it's ok ...';

(d) '23/09/2013 03:44PM: Jenny: Actually Annai very happy that v managed to get u the 10% off ... Happy that u own the hse, which is something big in ur life ...'; and

(e) '23/09/2013 03:48PM: Rennick ram: Ya anni I also didn't thought that I'm going to get one. Only thing I always wanted to have is a own houe. Thanks to both you and annai ...';

(CBOD Pt B p 269);

(i) '16/12/2013 12:49PM: Jenny: Kailash, am ur sister in law ... If am a bad person, today u won't be buying house ...';

(ii) '16/12/2013 12:51PM: Jenny: Don't worry, annei & me decided that 10% down payment is our advance wedding gift for u ...';

(iii) '16/12/2013 12:54PM: Jenny: V supposed to tell u ab tur advance wedding gift past 2 week in Ben's bfast appointment but u didn't turn up ...'; and

(iv) '16/12/2013 12:59PM: Jenny: Pls bare with me by end of this moths ... Don't worries, X2 is ur house 100% under ur single name got nothing to do with RP ...'.

(CBOD Pt B p 286).

[36] The plaintiffs are now contending that the Whatsapp communication has been doctored by a third party whose name the defendant refused to disclose. They submit that the Whatsapp communication is inadmissible and if

this court admits it, no weight should be attributed to it as it is nothing more than a 'cut and paste' of conversations and not a contemporaneous record of what took place. However, it is noted that the documents for the Whatsapp communication are all Part B documents in the common bundle of documents ('CBOD'). As submitted by the defendant, it was the solicitor for the plaintiffs who had agreed to classify the documents on the Whatsapp communication as Part B documents in the agreed bundle of documents ie the CBOD.

[37] Under O 34 r 2(2)(e)(i) of the Rules of Court 2012, a Part B document means that the authenticity is not disputed, but the contents are disputed. Therefore, the documents on the Whatsapp communication are admitted by this court as evidence since they are Part B documents. It is an afterthought for the plaintiffs to now dispute the authenticity of the Part B documents, and this cannot be allowed.

[38] As for the contents of the Whatsapp communication which are disputed by the plaintiffs, upon a careful scrutiny of the messages, it is without doubt that from the very start, the plaintiffs had assisted the defendant to buy the property for himself. The question of the defendant holding it on trust for the plaintiffs does not even arise. In fact, in the Whatsapp communication dated 16 December 2013 at 12.51pm, the second plaintiff told the defendant that she and the first plaintiff have decided that the '10% down payment' is their 'advance wedding gift' for the defendant.

[39] From the totality of the evidence adduced by both parties, the court finds that whilst there is certainty of words and certainty of subject, the plaintiffs failed to discharge their burden of proving the third element to create a trust, namely that there is certainty of words to the effect that the plaintiffs created a trust on the property which is held in the defendant's name.

[40] Finally, as submitted by the defendant, there is no registration of the defendant holding the property 'as trustee' in the memorial of registration by the registrar under s 344 of the National Land Code to prove that the trust exists.

DECISION

[41] Based on the above considerations, the court is satisfied that the plaintiffs have failed to prove, beyond reasonable doubt, that they had purchased the property in the defendant's name and such property is held on trust by the defendant for the plaintiffs.

[42] Accordingly, the plaintiffs' claim is dismissed. Costs of RM8,000 are to be paid by the plaintiffs to the defendant, subject to payment of the allocatur fee of 4% of the costs.

Plaintiffs' claim dismissed with costs of RM8,000 subject to payment of allocator fee of 4% of the costs.

Reported by Nisha Paran